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Nos. 473, 474, 475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, Commissioner of Internal Revenue,
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v.
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No. 475

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v.
DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Board of Tax Appeals (Campbell, No. 473, R. 112) in the *Campbell* case is reported in 39 B. T. A. 916. The Board's opinions in the *Knox* and *Rogers* cases

are memorandum opinions and are unreported (Knox, No. 474, R. 47; Rogers, No. 475, R. 91). The opinion of the Circuit Court of Appeals in all three cases (Campbell, No. 473, R. 133; Knox, No. 474, R. 63; Rogers, No. 475, R. 106) is reported in 112 F. (2d) 530.

Jurisdiction

The judgments of the Court below were entered on July 29, 1940 (Campbell, No. 473, R. 139; Knox, No. 474, R. 69; Rogers, No. 475, R. 113). The petition for a writ of certiorari was filed on September 28, 1940, and was granted on November 12, 1940. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

I

As remaindermen of testamentary trusts, the respondents received from the trustees certain securities which had been part of the corpus of the trusts. Some of those securities had been purchased by the decedent and were owned by him at his death; others were purchased by his executors; still others were purchased by the testamentary trustees. What date should be used, under the Revenue Acts of 1928 and 1932, in fixing the basis for determining gain or loss on the sale of these securities by respondents? (This question is common to all three cases.)

II

In the *Knox* case (No. 474) the respondent, a remainderman of a testamentary trust, sold certain securities within two years after they had been received by him from the trustees, but more than two years after the securities had been purchased by the trustees. Were these securities "property

held by the taxpayer for more than two years'' and, therefore, "capital assets'' within the meaning of Section 101(c) (8), the capital gain and loss provision, of the Revenue Act of 1928?

III

In the *Campbell* case (No. 473) the respondent had purchased certain shares of Woolworth stock prior to the distribution to her as remainderman of a testamentary trust of other shares of Woolworth stock. The latter shares were obtained by the trustees prior to respondent's individual purchases. In applying the "first in, first out'' rule, which stock must be deemed to have been sold first?

Statutes Involved

The statute involved in the *Campbell* and *Rogers* cases is the Revenue Act of 1932. The statute involved in the *Knox* case is the Revenue Act of 1928. The applicable sections of both Acts appear in Appendix A (*infra*, pp. i-iii).

Statement

The facts are not in dispute. They are set out with substantial accuracy at pp. 8-12 of the Commissioner's *Gambrill* Brief, Nos. 472-475.

The issues were decided in favor of the respondents by unanimous decisions of the Board of Tax Appeals. The Board's decisions were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit in an opinion by Circuit Judge A. N. Hand.

Summary of Argument

I. With respect to the "basis" issue:

Respondents' basis for tax purposes in securities distributed to them by the testamentary trustees is to be determined under the provisions of the third sentence of Sec-

tion 113(a)(5) of the Revenue Acts of 1928 and 1932 which provides that "if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." This is true whether the securities were owned by the decedent at the date of his death or were purchased thereafter by the executors or by the testamentary trustees.

The "taxpayer" referred to in the third sentence of Section 113(a)(5) is the person whose tax liability is under review. The words "time of the distribution to the taxpayer" should be given their plain, ordinary and natural meaning and in these cases should be construed to be the respective dates on which distribution of the securities was made by the trustees to the respondents.

II. With respect to the "period of holding" issue:

Since the loss of the respondent Knox resulted from the sale of securities distributed to him by the testamentary trustees within two years prior to his sale thereof, such securities were not "capital assets" even though the trustees had purchased the securities more than two years prior to such sale. Until the trust property was distributed to him there was no certainty that Mr. Knox or his estate would receive any part of it. Until then he had individually no interest, legal or equitable, in the property constituting the trust corpus. His sole right was a chose in action to enforce the performance of the terms of the trust. This Court has held that "to hold property is to own it," and that to "acquire" property is to obtain it "as one's own." Our contention is that property which is in trust and which the remainderman may never receive cannot be said to be "owned" by the remainderman or to have been obtained as his own and, therefore, cannot be said to have been "held" by him until it was distributed to him free of trust.

III. **With respect to the "first in, first out" issue:**

Since the "first in, first out" rule is a formula for determining the order in which shares of stock are deemed to have been sold where the particular shares cannot be identified, the order in which the shares become available to the taxpayer for sale should be determinative. In this view the shares purchased by the respondent Campbell individually and with her own funds prior to the distribution to her of like shares by the testamentary trustees should be deemed to be "first in," regardless of the time of acquisition by the trustees of the shares subsequently distributed to the taxpayer.

ARGUMENT

FIRST POINT

The basis for income tax purposes of the securities received by the respondents from the testamentary trustees is the fair market value thereof on the respective dates on which such securities were delivered to the respondents. This is true whether such securities were owned by the decedent at the date of his death or were purchased thereafter by the executors or the testamentary trustees.

A. The construction and legislative history of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932.

The securities involved in these cases were delivered to the respondents by the testamentary trustees in accordance with and on the dates specified in the will of the decedent. The respondent Knox in 1930 sold the securities so delivered to him; the respondents Campbell and Rogers in 1933 sold the securities so delivered to them. The securities delivered to the respondent Knox had been purchased by the testamentary trustees. Some of the securities delivered to the respondents Campbell and Rogers had been owned by

the decedent at the date of his death, others had been purchased by the executors and still others had been purchased by the testamentary trustees.

No real property is involved. None of the securities involved was acquired by specific bequest.

We will discuss first, the statute, the Commissioner's contention with respect to it and its legislative history. Second, we will discuss matters particularly applicable to the basis of securities owned by the decedent at the date of his death, and third, matters particularly applicable to the basis of securities purchased by the executors or trustees. Fourth, we will discuss the assumption made by the Commissioner of the existence of some alleged Congressional plan with respect to the establishment of cost bases. Finally, we will analyze the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner v. Maguire*, 111 F. (2d) 843 (1940), which is to be argued herewith (No. 346, present term), and which is the only authority supporting the Commissioner's position.

I. The statute and its interpretation.

The basis for gain or loss on the sale of the securities involved is controlled by the third sentence of Section 113(a) (5) of the Revenue Acts of 1928 and 1932. The first sentence of this section provides the basis for personal property "acquired by specific bequest" and real property "acquired by general or specific devise or intestacy." The second sentence defines the basis of property sold by a decedent's estate. These sentences are inapplicable. The third sentence is as follows:

> "* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

The respondents contend that the phrase, "the time of the distribution to the taxpayer," means precisely what it says, that is, the time when the property was delivered to the taxpayer whose tax is at issue, here the respondents.

The words of the statute are clear and unambiguous. Such a statute must be given effect as written. *McClain v. Commissioner*, U. S. Sup. Ct., Jan. 6, 1941; *Helvering v. Northwest Steel Rolling Mills, Inc.*, U. S. Sup. Ct., Nov. 12, 1940; *Helvering v. Wood*, 309 U. S. 344 (1940); *Deputy v. Dupont*, 308 U. S. 488 (1940).

The Court below so held, saying:

> "The words 'the property' in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term 'taxpayer' is defined by Section 701(a) (13) of the Revenue Acts of 1928 and 1932 as 'any person subject to a tax imposed by this Act.' It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'"

(Campbell, No. 473, R. 136; Knox, No. 474, R. 66; Rogers, No. 475, R. 109.)

The Court decisions on the point except for the *Maguire* case, *supra*, support the respondents' contention.[1]

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[1] Commissioner v. Libbey, 100 F. (2d) 458 (C. C. A. 1st, 1938); United States v. Van Nostrand, 94 F. (2d) 510 (C. C. A. 1st, 1938).

See also Haskell v. Commissioner, 78 F. (2d) 869 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 652 (1935); Williamson v. Commissioner, 100 F. (2d) 735 (C. C. A. 6th, 1938), cert. denied, 307 U. S. 623 (1939); Commissioner v. Taft, 101 F. (2d) 1007 (C. C. A. 6th, 1939).

Cf. Lane v. Corwin, 63 F. (2d) 767 (C. C. A. 2d, 1933), cert. denied, 290 U. S. 644 (1933); Twining v. Commissioner, 83 F. (2d) 954 (C. C. A. 2d, 1936), cert. denied, 299 U. S. 578 (1936); Becker v. Anchor Realty & Investment Co., 71 F. (2d) 355 (C. C. A. 8th, 1934); Fidelity & Columbia Trust Co. v. Commissioner, 90 F. (2d) 219 (C. C. A. 6th, 1937), cert. denied, 302 U. S. 723 (1937).

The Board of Tax Appeals in a long line of decisions under the 1928 and 1932 Acts has consistently reached the same result.[2]

The opinion of the leading writer on income taxation is identical with respondents' contention. 2 Paul & Mertens *The Law of Federal Income Taxation* (1934) §18.88, pp. 346-348; Paul & Mertens (Mertens Supp. 1939) §18.88, p. 809.

The decision in the *Maguire* case rests upon an interpretation of the legislative history of Section 113(a) (5) of the Revenue Act of 1928 which is fragmentary and incorrect. (See *infra*, pp. 9-13, 35-36; *cf. Appendix B*, pp. viii-xv).

The opinion in *Jenkins v. Smith*, 21 F. Supp. 433 (D. Conn. 1937), rev'd on other grounds, 99 F. (2d) 827 (C. C. A. 2d, 1938), relied upon by the Commissioner (Commissioner's *Maguire* Brief, No. 346, p. 26), is dictum as to this issue and has been impliedly overruled by the Second Circuit Court of Appeals in these cases.

II. The Commissioner's contention.

The Commissioner contends that the clear and exact language of Section 113(a) (5) must be narrowed. He maintains that as to securities owned by the decedent or purchased by the executors, the basis is the value of the securities at the time of the delivery to the testamentary trus-

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[2] Ralph W. Harbison, 26 B. T. A. 896 (1932), rev'd on another issue, 68 F. (2d) 1004 (C. C. A. 2d, 1934), aff'd, 293 U. S. 144 (1934); Mary Colgate, 27 B. T. A. 506 (1932), rev'd on other grounds, 69 F. (2d) 809 (C. C. A. 2d, 1934), aff'd, 293 U. S. 144 (1934); Lillian McDonald Brinton, 28 B. T. A. 472 (1933); Margaret E. B. Fleming, 36 B. T. A. 773 (1937); Richard Van Nest Gambrill, 38 B. T. A. 981 (1938), aff'd, 112 F. (2d) 530 (C. C. A. 2d, 1940), No. 472, present Term (to be argued herewith). See also James W. Arrott, Jr., 34 B. T. A. 133 (1936); Robert A. Taft, Trustee, 34 B. T. A. 603 (1936), aff'd per curiam, 101 F. (2d) 1007 (C. C. A. 6th, 1939); Bessie C. Williamson, 34 B. T. A. 668 (1936), mod'f'd, 34 B. T. A. 924 (1936), aff'd, 100 F. (2d) 735 (C. C. A. 6th, 1938), cert. denied, 307 U. S. 623 (1939).

tees; as to securities purchased by the trustees, the basis is their cost to the trustees. His argument is elaborate but, simply stated, reduces to less than a syllogism:

1. Congress throughout the Revenue Acts has followed a general plan of fixing the basis for property acquired by inheritance at the date of the decedent's death.

2. Therefore, Section 113(a) (5) of the Revenue Acts of 1928 and 1932 must be limited to provide a basis nearest in time to date of death.

All other arguments of the Commissioner are subordinate to this.

The answers are complete and equally simple:

1. The provisions of Section 113(a) (5) are expressly contrary to the Commissioner's conclusion.

2. No such general Congressional plan of date-of-death basis ever existed.

The fallacy in both the Commissioner's major premise of a general Congressional plan and his conclusion on the narrow interpretation of the 1928 Act is most clearly shown in the immediate history of the enactment of the Revenue Act of 1928.

III. The History and Development of Section 113(a) (5) of the Revenue Act of 1928.

The 1926 and prior Revenue Acts had provided that the basis for property acquired by inheritance was the value at the date of acquisition. The phrase "date of acquisition" had been construed in a variety of ways by the Board of Tax Appeals, the Courts and the Bureau of Internal Revenue. In particular, the case of ***McKinney v. United States***, 62 Ct. Cl. 180 (1926), in which the Court of Claims held that the basis for securities sold by an executor was the decedent's basis, had added greatly to the confusion.

For the information of the Court we have set forth in Appendix B a chronological history of the Revenue Acts in so far as they relate to the basis of property acquired by inheritance and gift.

In 1927 the Joint Committee on Internal Revenue Taxation made a report which recommended that in the interest of certainty the statute be changed to adopt as the basis the value of the property at the date of the decedent's death. H. R. Doc. No. 139, 70th Cong., 1st Sess. (1927) 17. The report stated as its reasons for the recommendation in part as follows:

> "Section 204(a) (5) prescribes the basis when the beneficiary sells the property as the value at the time of 'acquisition.' Some doubt has arisen as to what is meant by the date of acquisition. The 'date of death' is recommended to make the basis certain and definite."

In accordance with this report, Section 113(a) (5) of the Revenue Act of 1928 was introduced in the House in the following form (H. R. 1, 70th Cong., 1st Sess.):

> "(5) Property Transmitted at Death.—If the property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of the death of the decedent."

The report of the Ways and Means Committee accompanying this bill explained the change as follows (H. R. Rep. No. 2, 70th Cong., 1st Sess. (1927) 18, 1939-1 Cum. Bull. (Part 2) 384, 396):

> "Sec. 113. Basis for Determining Gain or Loss.—Executor's Sale.
>
> "In view of the decision of the Court of Claims in McKinney v. United States, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113(a) (5).

"It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.

"Under existing law, the basis in such a case is the value at the date of 'acquisition,' which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis."

If the House bill had been enacted in 1928 there would be support for the Commissioner's contention that a Congressional plan existed of fixing the basis for property acquired by inheritance at the date of decedent's death. But the House bill was not enacted by Congress and has never been enacted. *Cf. Helvering v. Wood,* 309 U. S. 344 (1940). Section 113(a) (5) as reported to the Senate by the Senate Finance Committee was in entirely different form. As so introduced the bill read:

"If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer;"

The Senate Committee report explains the reasons for this change at length. Sen. Rep. No. 960, 70th Cong., 1st Sess. (1928) 26, 27, 1939-1 Cum. Bull. (Part 2) 409, 427. After reviewing the reasons for the change made by the House bill, the report to the Senate continues:

"It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the

will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty, or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. * * * In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

The Senate Committee report is set forth in full in Appendix A, pp. v-vi.

Section 113(a) (5) was passed by the Senate in the form reported by the Senate Committee and in the Conference Committee the House receded, adding only an amendment making the section applicable to revocable *inter vivos* trusts. The report of the Conference Committee repeated the above quoted part of the Senate Finance Committee report as the explanation of the Conference Committee's action. H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928) 3, 14, 1939-1 Cum. Bull. (Part 2) 444, 447.

Clearly the immediate purpose of Congress in enacting Section 113(a) (5) of the Revenue Act of 1928 was to substitute certainty for the confusion which then existed. For real estate and specific bequests, the date of death,

an easily ascertainable event, was chosen as the basis-establishing date. In all other cases, the time of distribution to the taxpayer, another event usually definite of ascertainment, was chosen as the time as of which value should establish basis.

Equally clearly, Section 113(a) (5) of the 1928 Act was a complete change from the corresponding sections of prior Acts. In *Brewster v. Gage,* 280 U. S. 327 (1930) this Court so held, stating at p. 337:

> "The Revenue Act of 1928, §113 (a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819. The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

B. The basis of securities owned by the decedent at the date of his death and distributed to respondents by the testamentary trustees.

I. The clear language of Section 113(a) (5) of the Revenue Acts of 1928 and 1932 requires that this basis shall be the fair market value of the securities at the time of their delivery by the trustees to the respondents.

1. The Commissioner concedes that the third sentence of Section 113(a) (5) of the 1928 and 1932 Acts is controlling in the determination of the basis of the securities owned by this decedent at the date of his death. This sentence fixes the basis "at the time of the distribution to the taxpayer."

The Commissioner contends, however, that this phrase should be construed as meaning the time of the delivery from the executors to the trustees.

Apparently the parties are in agreement that the word "distribution" in Section 113(a) (5) means delivery. Thus the Commissioner is contending for the time of delivery by the executors to the trustees, the respondents for the time of delivery from the trustees to the beneficiaries. The dispute narrows itself to the question of what is meant by the word "taxpayer."

2. Section 701 (a) (13) of the 1928 Act and Section 1111(a) (14) of the 1932 Act define the word "taxpayer" as follows:

> "The term 'taxpayer' means any person subject to a tax imposed by this Act."

The word "person" is defined in subsection (a) (1) of the same sections as:

> "The term 'person' means an individual, a trust or estate, a partnership, or a corporation."

Regulations 74, Article 1311, under the Act of 1928 interprets these sections as follows:

> "Art. 1311. Persons.—The Act recognizes four classes of persons—individuals, trusts and estates, partnerships, and corporations. * * * A taxpayer is any person subject to a tax imposed by the Act."

In the face of these precise statutory definitions it is entirely clear that the word "taxpayer" in Section 113 (a) (5) means the person whose tax is in issue, and not some entirely different person, an estate or trust.

The separateness of trust and beneficiary for tax purposes has been expressly recognized by this Court. In *Anderson v. Wilson,* 289 U. S. 20 (1933) the Court, speaking through Mr. Justice Cardozo, said at p. 27:

> "* * * we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. * * *"

The argument of the Commissioner here will be recognized as essentially the unsuccessful argument of the taxpayer in *Anderson v. Wilson, supra.*

Where the trustee sells the securities he is the taxpayer as defined in the statute and his basis is the value at the time of delivery to him. Under the statutory plan there is no more anomaly in the beneficiary and the trustee having different bases on the sale of property than there is in John Smith and Henry Jones having different bases. *Cf.* Commissioner's *Maguire* Brief, No. 346, p. 28.

Under the careful and exact language of the Revenue Act, therefore, the phrase "the time of the distribution to the taxpayer", in cases where the basis of securities sold by a beneficiary is at issue, can only mean at the time of the delivery of the securities to the beneficiary.

II. In answer to the Commissioner's contentions.

1. The Commissioner's contention is that the phrase "time of the distribution to the taxpayer" should be construed as if it read "time of the distribution by the executors to the trustees."[3]

2. The Commissioner's contention loses sight of the expressed purpose of Congress in enacting Section 113 (a) (5) of the Revenue Act of 1928 to end the confusion which had resulted from the previous statutory provision. A basis determined as of the time of the delivery by exec-

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[3] It is perhaps significant that when the Commissioner states his construction of the statutory words "time of the distribution to the taxpayer", he uses the paraphrase "distributed by the executors." (Commissioner's Maguire Brief, No. 346, e. g., p. 16.) If Congress had meant that its language should be so construed it might easily have written Section 113(a) (5) in those words. Elsewhere in the Revenue Acts, Congress has demonstrated its capacity to write the phrase "distributed by the executors" when that is what it means. Cf. Section 811(j) of the Internal Revenue Code (the optional valuation section of the estate tax) in which Congress provided that property "distributed by the executor" within one year after the decedent's death shall be included in the gross estate "at its value as of the time of such distribution."

utors to trustees yields only utter confusion. The following is illustrative:

In common forms of wills the testator may simply appoint an executor but in his dispositive provisions impose trust duties on the executor; he may appoint only an executor but expressly create a trust; or he may appoint a single fiduciary, call the fiduciary an "executor and trustee" and make no distinction between the powers and duties in the two capacities. Assume a gift of personalty under such wills, not a specific bequest. If a remainderman under any of these wills sells property, how does the Commissioner's basis of value at the date of delivery to the trustee apply? Under the first two types of wills in form and in fact there is but one fiduciary and in practice there will be no distinction between the fiduciary's two capacities. Under all three types of wills the fiduciary will never be required to transfer property to himself as trustee since the property may be and frequently is registered in his dual capacity. How is the date of the basis for which the Commissioner contends to be determined? Will it be the date on which the last debt is paid? Will it be the date beyond which local statutes permit distribution by the executor without recourse by unknown creditors? Will it be a date arbitrarily fixed after such a time has passed that the taxing authorities may say the fiduciary is necessarily holding as trustee? Or, on the other hand, will not the time of the distribution be the time when the property is delivered to the beneficiaries?[4]

[4] This same problem exists under New York law in determining whether a fiduciary who acts as both executor and trustee is entitled to double commissions. The difficulties in the problem are sharply emphasized by the volume of litigation of the question in New York. The New York digest lists 93 decisions on the point. 16 Abbott New York Digest (1929) "Executors and Administrators" §495(2); 16 Abbott (1940 Cum. Annual Pocket Part) 190-194. See, e. g., Matter of Schliemann, 259 N. Y. 497 (1932). For other examples of the difficulties, see, Matter of McDowell, 178 App. Div. 243, 164 N. Y. Supp. 1024 (3d Dept. 1917); Matter of Robinson, 155 Misc. 855, 280 N. Y. Supp. 687 (Surr. Ct., 1935).

It is apparent that a basis of value at the date of the delivery by the executors to the trustees, as contended for by the Commissioner, could be applied with certainty only in those cases where there is a clear separation of identity of executors and trustees. The certainty sought for by Congress would therefore depend entirely upon the form of appointment employed in the particular will and the identity of the appointees. On the other hand, if, as the respondent taxpayers believe, the date of distribution to the beneficiaries is the basis-establishing time, certainty is promoted, since that event is necessarily clearly marked in almost every instance by a manual tradition, an actual handing over, of property from one person to another.

Necessarily the problem here outlined is present in those cases where property is sold by a testamentary trustee.[5] But, to say that Congress intended to enact the basis for which the Commissioner contends in every case, including that of a sale by a remainderman, is to say that it has enacted a basis which is impossible of general application while announcing that it is substituting certainty for confusion. Such a conclusion amounts to imputing to Congress an inability to provide the means to reach its clearly expressed end; and this conclusion can be attained only by the dubious process of reading away the clear language of the statute.

3. Not only does the Commissioner's proposed basis lead to uncertainty, its renders Section 113 (a) (5) inherently contradictory.

In the course of the enactment of Section 113 (a) (5) of the 1928 Act the House added to the section, while the bill was before the Conference Committee, a fourth sentence which provides as follows:

[5] In addition, where the fiduciary sells there is necessarily present the further problem of determining whether the sale is made in the capacity of executor or the capacity of trustee.

> "In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death."

H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928) 3. The Conference report describes the scope of this provision as follows:

> "This rule includes sales or other dispositions by the trustee and also by a beneficiary of the trust."

H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928) 15, 1939-1 Cum. Bull. (Part 2) 444, 447. Under this provision, therefore, an *inter vivos* revocable trust is to be treated as a testamentary trust.

Assume the attempt to apply the Commissioner's basis to personal property, not a specific bequest, passing under such a revocable trust. The basis of distribution from executor to trustee is impossible of such application; there is only one fiduciary. The date of death can not be the basis since the gift was not a specific bequest. Only the date of delivery to the beneficiary can be used as the basis in this situation. The argument advanced by the Commissioner would give the remainderman of a testamentary trust a different basis than the remainderman of a revocable *inter vivos* trust when it was the obvious intention of Congress that they should stand in the same position.

It might be added in passing that the statement in the Conference report on the 1928 Act last quoted shows that Congress was aware of the problem of sales by the beneficiary of a trust and was not merely concerned with the problem of sales by the beneficiary of an estate. (*Cf.* Commissioner's *Maguire* Brief, No. 346, p. 23.)

C. The basis of securities purchased by the executors or testamentary trustees and distributed to respondents by the trustees.

I. The basis of such securities is controlled by Section 113(a) (5) of the Revenue Acts of 1928 and 1932 and is the fair market value thereof at the time of their distribution by the trustees to the respondents.

1. As to securities purchased by the testamentary trustees and delivered to the respondents, the Commissioner contends that Section 113(a) (5) does not apply and that the basis is the cost to the trustee.

The third sentence of Section 113(a) (5) of the 1928 and 1932 Acts is as follows:

> "* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

The Commissioner's argument is that securities purchased by a trustee and delivered to the taxpayer are not "acquired by will" by the taxpayer and hence that this provision is not applicable. He then argues that the primary Section of 113(a) applies and requires the use of the trustee's cost.

The Commissioner concedes that the Committee reports on the 1928 Act require him to use some basis other than cost to the fiduciary in the case of securities purchased by executors (Commissioner's *Maguire* Brief, No. 346, p. 29; Commissioner's *Gambrill* Brief, Nos. 472-475, p. 20). This represents a change of position by the Commissioner. In the Court below he took the position that the basis for securities, whether purchased by the executors or trustees, was the cost to the purchasing fiduciary (Campbell, No. 473, R. 36, 69, 114, 137; Rogers, No. 474, R. 32, 93, 110).

2. The Court below in its decision in these cases held that all such property was acquired by will and hence that

the third sentence of Section 113(a) (5) of the 1928 and 1932 Acts applied to securities so purchased. In so deciding, it said:

> "* * * Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194-195."

(Campbell, No. 473, R. 137; Knox, No. 474, R. 67; Rogers, No. 475, R. 111.)

3. The ordinary meaning of the term "acquired by will" is the receipt of any property, in whatever form, which has its origin in the testator's estate. Suppose the ordinary pecuniary legacy of $5,000 to *A*. As a practical matter in most estates and theoretically in all estates the executor will be forced to sell property, receive cash and pay the legacy in cash. Only by accidental circumstances will there be enough cash to pay debts, taxes and legacies. The cash paid to *A* is not part of the original inheritance but it will hardly be denied that the cash received under this type of legacy is acquired by will.

4. Moreover, in a strictly legal sense, property purchased by executors or trustees and delivered to beneficiaries under a will is acquired by those beneficiaries "by will." The instrument of conveyance under which legal title to the property passes from the fiduciary to the beneficiary is the will. It is not and can not be any other document. All the beneficiary's interests, his "bundle of rights", stem from the will.

5. The Congressional Committee reports expressly indicate that Congress intended to include within the phrase "acquired by will" property purchased by a fiduciary. The Senate Finance Committee report gives the reason

for the change from the House bill which had provided a basis of value at the date of death as follows:

> "It appears that the House bill is inadequate to take care of *a number* of situations which frequently arise. *For example*, the executor pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. * * *
>
> "Accordingly, the Committee has revised section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. * * * In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, *for example*, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would *also* apply in cases where the executor purchases property and distributes it to the beneficiary." (Italics ours.)

Sen. Rep. No. 960, 70th Cong., 1st Sess. (1928) 26, 1939-1 Cum. Bull. (Part 2) 409, 427.

The full text of the report appears in Appendix A (pp. v-vi).

It is apparent that Congress intended to cover those cases of property acquired by will as to which the House bill was inadequate. If the House bill was inadequate to cover interim purchases by an executor, it was as clearly inadequate with reference to interim purchases by a trustee. The reference to property purchased by executors is simply an illustration following the words "for example" and indicates that this is not the sole situation which the change was designed to meet. The all inclusiveness of the statute as enacted is likewise shown by the statutory

provision that "*In all other cases*" the basis is value at the time of distribution to the taxpayer. It must be clear that the statutory language is as appropriate to control cases of purchase by a trustee as it is to provide a basis for property purchased by an executor.

There is no warrant, from anything which appears either in the statute or in the Committee reports, which justifies limiting the third sentence of Section 113(a) (5) to property purchased by executors.

6. The Courts have assumed, without question, with the single exception of the *Maguire* case, that Section 113(a) (5) of the 1928 Act, or corresponding sections of prior Acts, is determinative of the basis.[6]

The Board of Tax Appeals in a series of decisions has uniformly held that Section 113(a) (5) is controlling as to securities purchased by a testamentary trustee.[7] The recent decision of the Fourth Circuit Court of Appeals in *Reynolds v. Commissioner*, 114 F. (2d) 804 (1940), No. 684, present Term, cert. granted, Feb. 17, 1941, is a square holding that the basis of securities purchased by a testamentary trustee was determined under Section 113(a) (5), in that case, of the 1934 Act.

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[6] Warner v. Commissioner, 72 F. (2d) 225 (C. C. A. 2d, 1934), cert. denied, 293 U. S. 620 (1934), aff'g, 28 B. T. A. 1178 (1933); Commissioner v. Libbey, 100 F. (2d) 458 (C. C. A. 1st, 1938).

[7] George Emlen Roosevelt, 28 B. T. A. 194 (1933); Margaret E. B. Fleming, 36 B. T. A. 773 (1937); Richard Van Nest Gambrill, 38 B. T. A. 981 (1938), aff'd, 112 F. (2d) 530 (C. C. A. 2d, 1940), No. 472, present Term (to be argued herewith).

Text writers are of the same opinion. See 2 Paul & Mertens, The Law of Federal Income Taxation (1934) p. 348, n. 79. The authors there state:

"It is suggested that the Committees' reports expressly show that the third sentence of §113(a) (5) of the 1928 Act was intended to apply to cases in which property is purchased by an executor and distributed to the legatees.

"A similar rule would naturally obtain where the purchase was made by a testamentary trustee, once it has been conceded that distribution to the trustee is not a distribution to the beneficiary."

II. In Answer to the Commissioner's Contentions

1. The Commissioner's assumption that Section 113(a) (5) is inapplicable to securities purchased by the trustees is unsound for the reasons already stated.

2. The Commissioner, however, seeks to take refuge in an attempted distinction between executors and trustees. In the Court below he contended that purchases by each should be treated in the same manner for basis purposes, *i. e.,* that the remainderman should have as his basis the cost to the purchasing fiduciary. He admits that logic requires the same position here. The Senate Finance and Conference Committee reports on the 1928 Act, however, force him to concede that purchases by executors must be taken to be acquired by will within Section 113(a)(5) (Commissioner's *Maguire* Brief, No. 346, p. 29; Commissioner's *Gambrill Brief,* Nos. 472-475, p. 20).

(a) The Commissioner seeks to make his distinction, first, on the argument that the title of Section 113(a)(5) limits the application of the section (Commissioner's *Maguire* Brief, No. 346, pp. 29, 30). That title is "Property Transmitted at Death." The fact is that the history of this title completely destroys the significance which the Commissioner would attach to it. Prior to the enactment of the 1928 Act the subsections of the sections of prior Acts corresponding to Section 113(a) had had no titles. In the 1928 Act the sections were renumbered and the subsections of Section 113(a) given titles. As has been stated, the 1928 Act as first introduced in the House provided a single basis, *i. e.,* the "value of such property at the time of the death of the decedent." The title of Section 113(a)(5) of the House bill was "Property Transmitted at Death." It was, therefore, exactly consistent with the subsection. It is clear that the Senate bill completely changed the substance of the House bill and it is the Senate bill which re-

mained the form of the 1928 Act as finally enacted. The title to Section 113(a)(5) in the House bill was simply carried over to the Senate bill along with all other titles in the House bill. Since the Senate bill is a complete change from the House bill, a title drafted to describe Section 113(a) (5) of the House bill has no significance in interpreting the bill as finally enacted in the changed Senate form. In addition, it is clear that the title of a statute must yield to the "plain meaning of its text." *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 354 (1920); *Lapina v. Williams*, 232 U. S. 78, 92 (1914); *Fairport P. & E. R. Co. v. Meredith*, 292 U. S. 589, 594 (1934).

(b) As the second step toward making his purported distinction between purchases by an executor and purchases by a trustee, the Commissioner elaborates unquestioned differences between an executor and a trustee. (Commissioner's *Maguire* Brief, No. 346, pp. 30, 31.) These differences have no relevancy whatever in determining whether certain property is acquired by will.

The Commissioner uses them in turn as a springboard for arguing that during the estate administration the "basic testamentary disposition is in suspense," that the subsequent trust administration is not testamentary in nature. (Commissioner's *Maguire* Brief, No. 346, pp. 30-32.) This argument conceals two assumptions: one, that the time of holding by a fiduciary is material in determining whether property is acquired by will, and two, that a testamentary trustee acts for the beneficiary and not at the direction of the decedent.

Since the question at issue is *how* the property is acquired, *i. e.*, whether it is acquired by will, the time *when* the property is acquired is immaterial. See *Margaret E. B. Fleming*, 36 B. T. A. 773, 777 (1937). Similarly it is elementary in trust law that the powers and duties of a

testamentary trustee are dependent solely upon the terms of the will. He may purchase property only if, and of the kind, permitted by the will. He does not act for the beneficiary, but as a fiduciary carrying out the wishes of the testator as expressed in the will. His actions, as do an executor's, spring from "basic testamentary dispositions."

(c) Like the Commissioner's proposed basis of value at the time of delivery by the executors, his attempted distinction between the basis of property purchased by executors and that of property purchased by trustees, in practice is impossible of general application. Where the executor and trustee are the same person, the difficulty in many instances in determining whether the purchase was made by the executor or by the trustee is apparent.

3. The Commissioner argues generally for his position that property purchased by trustees is not acquired by will, by offering as analogies the sections on property acquired by gift and the sections in the 1926 and prior Acts and 1934 and subsequent Acts on property acquired by inheritance (Commissioner's *Maguire* Brief, No. 346, pp. 32-36). As we will later point out, these analogies are patently faulty. See *infra,* pp. 29-32. A better analogy is found in the provision under the estate tax, now Internal Revenue Code § 812(d), that a deduction will be allowed in "the amount of all bequests, legacies, devises or transfers" for charitable purposes. It is unquestioned that any property transferred to a remainderman-charity by a testamentary trustee in accordance with the provisions of the will, however the property is acquired by the trustee, is a "bequest, legacy or devise" within this provision. See, *e. g., Ithaca Trust Co. v. United States,* 279 U. S. 151 (1929).

Similarly, there is no question but that none of the property passing through a testamentary trust, however acquired, is taxable income to the trust remainderman under

Section 22(b) (3) of the Revenue Act of 1928 and corresponding sections of the other Revenue Acts which exclude from gross income "property acquired by * * * bequest, devise or inheritance."

Indeed, the Commissioner, in his *Maguire* Brief, No. 346, at pp. 6, 11 and 15, has by inference stated his understanding that the facts in the instant cases are within the provisions of Section 22(b) (3) of the 1928 and 1932 Acts, and, hence, that all of the securities delivered to the respondents, including those purchased by the trustees, were acquired by the respondents "by * * * bequest, devise or inheritance." Coupled with his express statement that the phrases "acquired by will" and "acquired by bequest, devise or inheritance" are synonymous (Commissioner's *Maguire* Brief, No. 346, p. 33), this amounts to an unavoidable admission by the Commissioner that property distributed by a testamentary trustee to a remainderman, however acquired by the trustee, is acquired by the remainderman "by will."

Such a result is implicit in the holding of this Court in *Lyeth v. Hoey,* 305 U. S. 188 (1938), with respect to Section 22(b) (3) of the 1934 Act, where the Court stated (at p. 194):

> "In exempting from income tax the value of property acquired by 'bequest, devise, or inheritance,' Congress used comprehensive terms, embracing all acquisitions in the devolution of a decedent's estate."

4. Corollary to his argument that Section 113(a)(5) is inapplicable to securities purchased by trustees, the Commissioner contends that the basis of such securities when sold by the remainderman is the trustees' cost. He assumes that this result follows under Section 113(a) of the statute (Commissioner's *Maguire* Brief, No. 346, pp. 36-37).

Significantly, aside from the *Maguire* case, the only decision in which the view has been entertained that another

taxpayer's cost may be used without statutory authority is *McKinney v. United States*, 62 Ct. Cl. 180 (1926). In that case executors sold property which had been purchased by the decedent. The Revenue Act of 1918 was controlling and since there was no provision in that Act comparable to Section 113(a)(5), the Court of Claims was obliged to determine the taxable gain, if any, upon a basis of "cost." Because the executors had not bought the property and, therefore, had no cost, the Court felt obliged to use the decedent's basis.

In *Hartley v. Commissioner*, 295 U. S. 216 (1935) the *McKinney* case was specifically disapproved by this Court. After pointing out that an administrator or executor is a separate taxpayer, this Court completely rejected the theory upon which the *McKinney* case was decided.[8]

Moreover, as we have already pointed out, the *McKinney* decision was so clearly contrary to Congressional intent that the amendments written into Section 113(a)(5) of the Revenue Act of 1928 were the almost direct result.

In *Helvering v. Gowran*, 302 U. S. 238 (1937), this Court, referring to the basis of stock dividends, said at p. 244:

> "Gain on them is, therefore, to be computed as provided in sections 111 and 113 * * * by the 'excess of

[8] It is worth noting the parallel between the Commissioner's argument at pp. 17, 18 of his Maguire brief, No. 346, and the reasoning adopted by the Court of Claims in the McKinney case. Here the Commissioner argues that since admittedly the basis of property sold by testamentary trustees is the value thereof when distributed to them by the executors, there should be no shifting of basis merely because the trustees distribute the property to the remainderman. In the McKinney case the court reasoned that since "the stock was the same stock as it had been in the hands of the decedent, and * * had he lived and sold the stock himself there would have been no question of taxable gain", the fact that the stock was sold by the executors "did not alter the situation". The parallel is interesting because it illustrates in a forceful way how inevitably the Commissioner's construction reverts to the precise position repudiated by this Court in the Hartley case and from which Congress thought it had escaped by enacting Section 113(a) (5) of the Revenue Act of 1928.

the amount realized' over 'the cost of such property' *to the taxpayer.*" (Italics ours.)[9]

Since the respondents and not the trustees are the taxpayers, they may not under Section 113(a) take the trustees' cost as their basis in securities distributed to them from the trust. The respondents' cost would be zero. *Helvering v. Gowran, supra.* This cannot be their basis, since the result would be to tax their entire inheritance, contrary to the express statutory exemption. Revenue Act of 1928, Section 22(b)(3). If Section 113(a)(5) is not applicable, as the Commissioner contends, then no section of the Act is applicable. The inevitable and only reasonable conclusion is that Section 113(a)(5), couched as it is in broad language to cover "all other cases" and specifically designed to take care of the "number of situations" which the date of death rule was inadequate to cover, is applicable.

5. The Commissioner's argument that Article 113(a)(5)-1(d) of Treasury Regulations 86 "represents the correct interpretation of earlier as well as later Acts" (Commissioner's *Maguire* Brief, No. 346, p. 37) is unfounded. Those Regulations were promulgated for the first time under the Revenue Act of 1934. They had no counterpart in the Regulations under the 1928, 1932 or prior Acts. Those Regulations weaken, rather than strengthen, the Commissioner's case. It is significant that this Regulation was issued as an interpretation of Section 113(a)(5) of the Act and not Section 113(a).

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[9] Illustrative of the general acceptance of this view, see Roswell Magill, "Taxable Income" (1936), p. 99, where the author says: "In general, of course, it (the amount of the gain) is the difference between the cost to the taxpayer of the asset sold, and the sale price."

D. With respect to the Commissioner's basic assumption that there is a uniform Congressional scheme which requires a basis of value as of the date of death in the case of property acquired by inheritance.

1. Used as the introduction to the summary of his argument (Commissioner's *Maguire* Brief, No. 346, p. 6) and frequently reappearing in the Commissoner's *Maguire* Brief, No. 346, (pp. 7-8, 15-16, 20, 36) is a basic assumption, upon which most of his arguments are builded. In the summary (p. 6) the Court is told "The historical development of the statutory provisions dealing with the basis for property acquired by gift or inheritance reveals a general plan to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands, and to use that value as the beneficiary's basis for determining gain or loss on a subsequent disposition." On pages 15-16, the reference is to a theory or scheme against time gaps "during which fluctuations in value of property are immunized from tax effect."

These words have a facile sound. Actually they are a deceptive over-simplification, which, if stated by other counsel, would suggest only a fragmentary familiarity with the Revenue Acts. In evaluating the force of these statements, basic to the Commissioner's argument, we believe the Court should give consideration to the following factors:

First. The vast majority of fluctuations in value of property are, by statute, and perhaps constitutionally, "immunized from tax effect." Gain or loss upon the sale or exchange of property is measured by comparison of the amount realized with the statutory cost basis. Interim fluctuations in value during the period of holding are without tax effect.

Second. As the Commissioner must and does admit, though he would dismiss it as of slight significance, the

Revenue Acts of 1928 and 1932, under which these cases arise, did clearly and indubitably provide for and establish such a "gap" as the Commissioner would have the Court believe was contrary to consistent Congressional policy. Section 113(a)(5) of those statutes did specifically provide that property acquired by will or intestacy should have as its cost basis not value at the date of death, but value at the time of distribution to the taxpayer, an event necessarily occurring some appreciable time after death. If it should be granted that the Commissioner were correct about a plan or scheme under earlier and later statutes, still it would be obvious that this assumed uniformity was abandoned in 1928, and no reason appears why the concededly new pattern of 1928 and 1932 should be expected to produce the old product of 1926 and prior years. And even if, in 1934, Congress did reconsider and revert to the earlier pattern, still the change then made is hardly to be considered as effective *nunc pro tunc*. It requires considerable ingenuity and some skill in dialectics to treat the Revenue Acts of 1928 and 1932 as though they had never existed.

Third. It is by no means clear that under provisions in other Acts corresponding to Section 113(a)(5) in the 1928 and 1932 Acts, value at date of death in all cases was the factor which established cost basis. The Commissioner and the lower Courts uniformly thought otherwise for a number of years (*infra*, p. 46; Appendix B, pp. viii-xi); the House, proposing so to enact in 1928, thought it necessary to amend the statute; and only recently a conflict in the Circuit Courts of Appeals with reference to the 1934 Act has developed, and has resulted in the granting of a writ of certiorari by this Court. *Cf. Reynolds v. Commissioner*, 114 F. (2d) 804 (C. C. A. 4th, 1940), No. 684, present Term, cert. granted, Feb. 17, 1941; *Van Vranken v. Helvering*, 115

F. (2d) 709 (C. C. A. 2d, 1940); *Archbold v. Helvering,* 115 F. (2d) 1005 (C. C. A. 2d, 1940); *Augustus v. Commissioner,* C. C. A. 6th, Feb. 14, 1941.

Fourth. For the past twenty years, out of the twenty-eight since the enactment of the Sixteenth Amendment, value of property as of the date of a gift has not established its cost basis to the recipient. (For detail, See Appendix B, pp. xiv-xv.) From 1920 to 1934 not value at the time of the gift, but the donor's cost, established the donee's cost basis. True, there was no time gap here after the date of the gift until cost to the donee should be established, but there was an overlap, which is equally inconsistent with the Commissioner's uniform pattern. And since 1934, what remained of consistency here has quite completely disappeared, since now in some cases the donor's cost is the basis, in others value at the time of the gift, and in still others the statute produces a stalemate in which neither of these costs bases is accepted and in effect the donee's selling price is treated as his cost basis, since neither gain nor loss will be recognized. The difference between the treatment of property acquired by direct gift (Section 113(a)(2)) and property transferred in trust *inter vivos* (Section 113(a)(3)) is a conspicuous illustration of this lack of uniformity even as between types of property very similarly acquired. *Cf. Edward T. Bedford Trust,* 42 B. T. A. 748 (1940).

Fifth. The Commissioner's argument implies, if it does not specifically state, a neat but non-existent integration of income, gift and estate tax statutes with reference to values and cost bases. The simplicity of plan assumed by the Commissioner would perhaps arise if the value of property employed in assessing gift and estate taxes thereupon became the income tax cost basis of the property in the hands of the recipient—if a taxable event under

gift and estate tax statutes always gave the property transferred a new and corresponding cost basis under the income tax statute. But this integration, this plan, has never existed. Under the gift tax statute, the gift tax is based upon the value of property at the time of the gift, while the donee's cost basis reverts to that of the donor. *Cf. Taft v. Bowers,* 278 U. S. 470 (1929). Under the estate tax statute, assessment may, since 1935, be based either upon the value at time of death or value one year thereafter. Internal Revenue Code §811(j). Yet the latter date is of no significance in ascertaining cost basis for income tax purposes. I. T. 3340, 1939-2 Cum. Bull. 167. So with property included in an estate, as having been transferred in contemplation of death, there is no reference to the estate proceeding in establishing the basis for cost for income tax purposes. Moreover, in those cases where the statute does provide that the value of property at the date of death shall be the recipient's cost basis, the value used in determining the estate tax is evidence, but only evidence, of value for determining the cost basis for income tax purposes. *May Rogers,* 31 B. T. A. 994 (1935), aff'd, 107 F. (2d) 895 (C. C. A. 2d, 1939); *Stella H. McConnell,* 29 B. T. A. 32 (1933). These are but a few of the possible examples which, together with the section here under consideration, show a complete lack of the integration with regard to statutory cost bases, the illusion of which is so carefully nursed by the Commissioner. *Cf. McFeely v. Commissioner,* 296 U. S. 102, 110 (1935).

Sixth. In choosing a time as of which market value shall establish a cost basis for income tax purposes, the factor of proximity or remoteness to some other event or time (here date of death) has no significance to the public revenues. Taxpayers like high cost bases; the government

profits from low cost bases. It is pure accident, dependent upon the unpredictable rise or fall of property values, whether an early date upon which cost basis shall be ascertained will help or hurt the revenues. If decedent *A* died in September, 1928, and his estate were distributed in September, 1929, the use of the earlier date would help the government. On the other hand, if decedent *B* died in September, 1929, and his estate were distributed in September, 1930, the use of the earlier date would help the taxpayer. It requires more than the Commissioner's easy rationalizing to find an expression of fiscal policy in the Congressional choice of one date rather than the other. The reports do not fail to furnish cases in which the Commissioner found it to the advantage of the public revenues to contend, and did contend, for the choice of the later dates for basis-establishing purposes. *Harry G. Haskell,* 30 B.T.A. 855 (1934), aff'd, *Haskell v. Commissioner,* 78 F. (2d) 869 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 652 (1935); *Bessie C. Williamson,* 34 B. T. A. 668 (1936), modified, 34 B. T. A. 924 (1936), aff'd, *Williamson v. Commissioner,* 100 F. (2d) 735 (C. C. A. 6th, 1938), cert. denied, 307 U. S. 623 (1939); *William P. Clyde, Jr.,* 32 B. T. A. 799 (1935); *Margaret E. B. Fleming,* 36 B. T. A. 773 (1937).

2. The Commissioner's assumption that opportunities for tax avoidance are greater under the construction of Section 113(a)(5) contended for by the respondents than under his own, is characteristic of the fictions upon which he founds most of his argument (Commissioner's *Maguire* Brief, No. 346, pp. 18-19, 28). The Commissioner intimates that the difference in time between the length of an executor's holding of securities and of the holding of a trustee provides such an opportunity. But length of time of holding has no necessary relationship to the fluctuation of value in securities and hence to the desire to avoid taxation. The

experience of the 1929 crash shows that the sharpest drop in securities may be during a very short period, as well within the period of executorship as the term of a testamentary trust. In fact, the fluctuation in value during executorship has been so great that Congress has permitted an optional date of valuation for estate tax purposes to prevent taxation in excess of the liquidated value of the estate. Internal Revenue Code §811(j).

Actually, the contrary of the Commissioner's contention is true. The basis of value at the time of delivery from executor to trustee, for which the Commissioner contends, gives a greater opportunity for avoidance than the basis of value at the time of delivery to the respondents, for which the respondents contend. Under the Commissioner's contention not only may the parties determine which of two taxpayers is to sell the property but in addition the parties are entirely free to choose the time when the basis-establishing delivery shall be made. This opportunity to choose an advantageous time is never open to the same extent in the case of a transfer from a testamentary trustee to the remainderman, since testamentary trusts almost without exception end on a fixed date, either the date of death of the life tenant, or a fixed number of years. The trustee must deliver the trust property as soon thereafter as is possible. Necessarily the opportunities for picking an advantageous time for establishing a cost basis are less after the death of a life tenant than during that amorphous period when an estate administration is to be terminated and a testamentary trust set up.

Further, the Commissioner forgets that a trustee is not an individual owning property in his own right but is a fiduciary, limited strictly by law and by the terms of the will in the administration and distribution of the trust estate.

E. **The Maguire Case.**

Only the decision of the Seventh Circuit Court of Appeals in *Commissioner v. Maguire*, 111 F. (2d) 843 (C. C. A. 7th, 1940), is contrary to the respondents' contentions. The respects in which the Court was misled in that case are disclosed in its opinion.

The Court, without exception, paraphrased the third sentence of Section 113(a) (5) to read: "If property is acquired by general bequest * * *." In fact, the statute reads: "*In all other cases* if the property is acquired either by will or intestacy * * *." Having thus narrowed the statutory language, it was not difficult for the Court to exclude property purchased by a fiduciary from its scope and to limit its applicability to the period of the executorship.

The Court also went astray in its analysis of the legislative history of Section 113(a) (5). Writing with reference to the changes effected by the Senate in the House version of that section, the Court says (at p. 846) that the Senate deemed the House bill weak "in *one* respect, in that it failed to take care of the situation where the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries." The fact is that the Senate Report said that the House bill was inadequate in "a *number* of situations" and the instance of property purchased by an executor was specifically stated to be only an "example" of those situations.

The Court's great reliance (at p. 847) upon the title of Section 113(a) (5), which, as we have pointed out above, is utterly without significance, and its dependence (at p. 847) upon the "substantially vested equitable ownership (of the taxpayer) at the time of distribution to the trustee," are simply further illustrations of the insecure foundations

upon which the Court rested its decision. *Cf. Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496 (1936). Significantly, the Court frequently referred to Ruth S. Maguire (the respondent below) as "the taxpa. r," but in paraphrasing the statutory language "distribution to the taxpayer," it used either the phrase "distribution to the trustees" or the phrase "distribution by the executors."

We respectfully submit that the careful analysis by the Circuit Court of Appeals for the Second Circuit in its opinion below in these cases leads to the correct construction of the statute and results in faithful observance of the clearly expressed intention of Congress.

SECOND POINT

Respondent Knox held the securities sold by him in 1930 for less than two years, within the meaning of Section 101(c) (8) of the Revenue Act of 1928. Hence the securities were not capital assets and his loss was not a capital loss.

A. There is no authority in Section 101(c) (8) for tacking to the respondent's period of holding the prior period of holding by the testamentary trustees.

The second issue presented is whether the loss resulting from the sale of certain securities by the respondent Knox on June 10, 1930 (Knox, No. 474, R. 22) was an ordinary loss or a capital loss. These securities were distributed to Mr. Knox pursuant to the provisions of Article Twenty-first (C) of his father's will upon his attaining the age of thirty years on September 1, 1928 (Knox, No. 474, R. 22). The securities thus sold had been purchased by the testamentary trustees in part on August 31, 1927, and in part on August 30, 1928 (Knox, No. 474, R. 21, 22). Hence, the securities were sold less than two years after they were distributed to Mr. Knox by the trustees but more than two years after the securities had been purchased by the trustees.

The controlling statute is Section 101 of the Revenue Act of 1928 which defines a capital loss as a loss resulting from the sale or exchange of "capital assets", and which defines "capital assets" as "property *held* by the taxpayer for more than two years" (Italics ours).

Section 101(c)(8) prescribes the circumstances under which the period of holding of the taxpayer shall be deemed to include the period for which the property is held by another taxpayer. The only paragraph of this section which is applicable to the instant case is paragraph (B) which reads as follows:

> "(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

Under Section 701(a)(1) of the Revenue Act of 1928, a "person" is defined as meaning, among other things, "an individual, a trust or estate * * *." Consequently, the testamentary trustees constitute an "other person" within the meaning of paragraph (B). The trustees' period of holding may not be added to Mr. Knox's period of holding unless "under the provisions of Section 113 such property has for the purpose of determining gain or loss * * * the same basis * * * in his hands as it would have in the hands of such other person."

This view appears to be at least tacitly concurred in by the Commissioner in his argument at pp. 25-26 of his *Gambrill* Brief, Nos. 472-475. Any other view would read paragraph (B) altogether out of the statute in so far as testamentary acquisitions are concerned. Or, stating it differently, it would amount to construing the reference in Sec-

tion 101(c)(8)(B) to Section 113 as if it read "Section 113 (except sub-paragraph (a)(5) thereof)."

In the First Point we have contended that Mr. Knox's basis in the property sold by him in 1930 is the fair market value thereof on the date it was distributed to him by the testamentary trustees. If this is so, the period of holding of the trustees may not be tacked to the period of holding of the respondent in determining whether the securities sold by the latter constitute capital assets.

The Court below so held (Knox, No. 474, R. 68). On this point the Circuit Court of Appeals said:

> "The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were 'capital assets' as defined in Section 101(c)(8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have 'for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands' of the trustees."

B. The McFeely cases, upon which the Commissioner relies, did not involve an intervening trust and are not controlling in this case.

The Commissioner contends that the cases entitled *McFeely v. Commissioner,* 296 U. S. 102 (1935) are controlling and that under them the period of holding in the instant case must be computed from the dates of the purchase of the securities by the trustees. In the *McFeely* cases the several taxpayers had received property either by residuary bequest, by widow's right of election, or by intestacy. No

testamentary trust was involved and none of the taxpayers before the Court was a remainderman. Each of the taxpayers sold property which had been distributed to him by the representatives of a decedent's estate. The Revenue Act of 1928 was involved. This Court held that the period for which the property was held, within the meaning of the capital gain and loss provisions of the statute, must be computed from the date of the decedent's death. The *McFeely* decisions were by a divided Court. Three Justices dissented upon the grounds assigned by the Second Circuit Court of Appeals in *Ogle v. Helvering,* 77 F. (2d) 338 (C. C. A. 2d, 1935), rev'd, 296 U. S. 103 (1935).

In the *Knox* case the Circuit Court of Appeals held that since the *McFeely* cases "involved an estate where there was no trust" and since this Court "only decided that the general legatee held the securities which were transferred to him by the executor at date of death," those cases were not controlling here (Knox, No. 474, R. 69). The Board of Tax Appeals reached the same conclusion (Knox, No. 474, R. 49, 50).

In the *McFeely* cases, this Court said at p. 107:

> "In common understanding to hold property is to own it. In order to own or hold one must acquire. The date of acquisition is, then, that from which to compute the duration of ownership or the length of holding. * * *"

In *Helvering v. San Joaquin Fruit & Investment Co.,* 297 U. S. 496 (1936), where the issue was whether a tenant-optionee of land "acquired" the land at the time the option was taken or at the time the property was conveyed to the lessee on the exercise of the option, the Court explained (p. 499):

> "* * * The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own.' Language used in tax statutes should be read in the ordinary and natural sense. * * *"

The Court's definition of the word is in accord with the meaning uniformly given it by the standard dictionaries. Some of these appear in the footnote.[10]

Not only does this Court's definition of the word "acquired" support respondent's position but the commonly accepted and ordinary meaning of the word "held," the specific word employed in Section 101(c)(8), even more completely compels the conclusion for which we contend. To say that a remainderman has "held" property during the time title to it is in testamentary trustees, where it may rest forty, fifty or more years, is to distort the word "held" beyond recognition. This is particularly true where the remainderman's interest is entirely conditional and where he has only a possibility of receiving anything under the will.

In the instant case Mr. Knox, unlike the taxpayers in the *McFeely* cases, is not one who acquired property from a decedent after a "withholding of possession for purposes of administration." He is the remainderman of a testamentary trust who did not acquire any interest in the specific property constituting the trust until the property was distributed to him by the trustees. We are not concerned with the respondent's period of holding of his remainder interest because he did not sell his remainder. We are concerned solely with his period of holding of the particular securities which he sold. During the continuance of the trust the trustees had the "whole title and estate" in the securities. *Whiting v. Hudson Trust Co.*, 234 N. Y. 394, 407 (1923); *Backer v. Levy*, 82 F. (2d) 270 (C. C. A.

[10] Webster's New International Dictionary, Second Edition (1934): "to get as one's own"; Bouvier's Law Dictionary: "To make property one's own. To gain permanently"; Funk & Wagnall's Practical Dictionary: "get as one's own"; Oxford Universal English Dictionary: "1. To gain or get as one's own * * *. 2. To receive, to come into possession of."

2d, 1936); I Restatement, Trusts (1935) §88; I Scott on Trusts (1939) §88.1. The respondent's interest was only "a chose in action, the right to enforce in equity the performance of the trust." *Whiting v. Hudson Trust Co., supra; Anderson v. Wilson,* 289 U. S. 20 (1933). See, *Archer-Shee v. Garland,* [1931] A. C. 1222, for a discussion of the New York law.

Under the provisions of the will the trustees had full powers of sale and reinvestment and by virtue of the exercise of these powers Mr. Knox might never have acquired the securities in question (Knox, No. 474, R. 33, 34). The gift to Mr. Knox under the provisions of the will was expressly conditioned upon his survival to the required age (Knox, No. 474, R. 32). In the event that Mr. Knox did not survive to the required age there was a gift over (Knox, No. 474, R. 32, 33). By reason of these provisions it is clear that Mr. Knox or his estate might never have received these particular securities or any other trust property. It was not until they were distributed to him that the taxpayer's interest became absolute and unconditional. The securities in question were not obtained as his own under the principle of the *San Joaquin* case until they were distributed to him free of trust. He could not have held them prior to that distribution and his period of holding dates from that time.

C. In view of the uncertain and conditional nature of the respondent Knox's remainder interest, he held the securities which he sold in 1930 only from the date of his thirtieth birthday when his interest became indefeasible and the securities were distributed to him by the testamentary trustees.

We have pointed out above that because of the intervening trust Mr. Knox had no property interest in the securities, and could not be said to hold them, until the trust terminated and they were distributed to him. We have also pointed out that because the gift to Mr. Knox was conditional upon his reaching a specified age, with a gift over in

case he failed to do so, it was more than possible until he reached that age that he would never acquire or "hold" the securities. We believe that this second factor, the factor of uncertainty, deserves further consideration, and that it makes clear beyond doubt that Mr. Knox's period of holding cannot extend farther back than the date on which he reached the age of thirty years, when he first became unconditionally entitled to the corpus of the trust and when, in fact, the securities were delivered to him.

In this connection the Commissioner states (Commissioner's *Gambrill* Brief, Nos. 472-475, pp. 31-34) that we place our reliance upon the distinction between technically contingent and technically vested estates, and not upon the difference between absolute and conditional interests. This is totally incorrect. Our reliance is upon the word "held" as used in Section 101(c) (8) of the Revenue Act of 1928, and, in this connection, upon what we believe to be the clear logic of the proposition that one cannot be deemed to hold, or to have held, property which, whatever the technical nature of the remainder interest, one may never obtain or acquire. To this position we believe the recent decision of this Court in *Helvering v. Hallock,* 309 U. S. 106 (1940) lends powerful support. Since the Commissioner, too, claims support from that decision, it becomes important, in order to resolve the conflict, to state clearly the situation here, the effect of the decision in the *Hallock* case, and its applicability here.

At the outset it is to be clearly understood, and it is undisputed, that had Mr. Knox failed to reach the age of thirty years, neither he nor his estate would have received the trust corpus or any interest therein. Had that event occurred the securities making up that corpus would have gone in accordance with the terms of the gift over. The gift, therefore, was "rendered incomplete" (309 U. S. at 114) by the terms of the trust instrument until the re-

mainderman reached the age of thirty. Whether his interest was technically contingent or not, it was not assured—it was what we shall call "conditional," in contradistinction to the technical term "contingent." "It is perfectly plain that [reaching the age of thirty] was the indispensible and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living." *Helvering v. Hallock,* 309 U. S. at p. 111.

What, then, did the *Hallock* case determine? That case and its predecessors[11] involved *inter vivos* trusts, each with a gift to a remainderman conditional upon his surviving the grantor, or subject to defeasance if he did not so survive. The question in each case was whether, for estate tax purposes, these were transfers "intended to take effect in possession or enjoyment at or after [the grantor's] death." Section 302(c), Revenue Act of 1926. In the *St. Louis Union Trust* cases it was held the test was whether the remainders were contingent or were vested subject to defeasance. In the *Hallock* case this test was renounced and overruled, this Court saying (p. 118) that under it "Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes." Instead the Court turned to the "harmonizing principle" (309 U. S., p. 118) of the *Klein* case; *i. e.,* "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of vested and contingent remainders. It is perfectly plain that the death of the grantor was the indispensible and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the tax-

[11] Klein v. United States, 283 U. S. 231 (1931); Helvering v. St. Louis Union Trust Co., 296 U. S. 39 (1935); Becker v. St. Louis Union Trust Co., 296 U. S. 48 (1935).

ing act and justifying the tax imposed." (309 U. S. at p. 111)

How, then, does that decision affect the present case? The decision there was that since the death of the grantor did in substance free from uncertainty the grantee's interest, the transfer was one which "took effect" at the time of the grantor's death, regardless of the technical nature of the grantee's remainder interest. Here the remainderman Knox was in the same position as the grantee in the *Hallock* case. Whatever the nature of his remainder interest, he must survive to his thirtieth birthday in order to receive the property. And here the question is when the respondent Knox did begin to "hold" the property he then received. To hold or own, this Court has held, one must acquire, one must obtain as one's own.[12] And one has not done that, the Court has held, when one has an equitable interest in property conditional upon payment of the purchase price.[13] Similarly, it is obvious that the grantee in the *Hallock* case did not, prior to the grantor's death, own, and was not holding the property there taxed. If the grantee had owned prior to that time, the transfer would not have taken effect at death, and there would have been no tax. So here, prior to the time the respondent Knox reached thirty, whatever the technical nature of his remainder interest, he did not own or hold the property in question. The transfer to him "took effect" when he reached thirty, and he then for the first time began to own and hold the property which then became his.

On the basis of this reasoning it is apparent that we believe the Commissioner is correct in his arguments (Commissioner's *Gambrill* Brief Nos. 472-475, pp. 17-18, 30-35)

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[12] Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936); McFeely v. Commissioner, 296 U. S. 102 (1935).

[13] Helvering v. San Joaquin Fruit & Investment Co., supra, note 12.

that it is immaterial whether the respondent's remainder was technically vested or contingent. But by the same token, we believe the Commissioner is indubitably wrong when he asserts that the respondent "held" the securities making up the corpus of the trust before he reached the age of thirty years. The Commissioner's premise we here accept and urge as correct. His conclusion is without logic to support it. In its recent decision in *Van Vranken v. Helvering,* 115 F. (2d) 709 (C. C. A. 2d, 1940), relied upon by the Commissioner, we believe it patent that the Court, in an analogous situation, fell victim to the same fallacy in its application of the *Hallock* decision.

Both the Commissioner and the Court in the *Van Vranken* case properly brush aside the technical distinction between vested and contingent remainders. But both then proceed to treat all remainders as unconditional and conveying absolute ownership. This is squarely opposed to the decision in the *Hallock* case. If their conclusion were correct, there could have been no tax in the *Hallock* case, since the remainderman would have owned the property prior to the grantor's death, and the transfer could not have been held to have taken effect upon that event.

The position we have here set forth rests squarely upon the recent decisions of this Court. We believe this position sound and that it requires a decision for the respondent on this issue.

An alternative position is possible. It is based upon the technical contingency of the remainder and the familiar "re-enactment rule" for the construction of statutes. This position also requires a decision for the respondent Knox on this issue.

From 1920 until 1935 the Bureau of Internal Revenue consistently ruled that one did not "acquire" property so

long as the interest in the property remained contingent. In G. C. M. 10260, XI-1 Cum. Bull. 79, 80 (1932), General Counsel to the Bureau stated:

> "* * * the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) (See also I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 3, 50)"

The ruling O. D. 727, 3 Cum. Bull. 53, cited by the General Counsel, was promulgated in 1920. This ruling and other rulings to like effect remained in full force and effect until 1935.

The same test was applied by all of the Circuit Courts of Appeals to which the question had been presented prior to the enactment of the Revenue Act of 1934.[14]

Therefore, at the time of the enactment of this Act, which, in Section 113(a)(5) reverted to the phrase "time of acquisition" of the 1926 and earlier Acts, the word "acquired," as applied to contingent remainders, had received a uniform administrative and judicial construction.[15]

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[14] Lane v. Corwin, 63 F. (2d) 767 (C. C. A. 2d, 1933), cert. denied, 290 U. S. 644 (1933); Pringle v. Commissioner, 64 F. (2d) 863 (C. C. A. 9th, 1933), cert. denied, 290 U. S. 656 (1933); Becker v. Anchor Realty & Investment Co., 71 F. (2d) 355 (C. C. A. 8th, 1934); Louis Kalb, 15 B. T. A. 886 (1929). The same test was applied in other cases in which, however, the Courts held the remainders to be vested. Chandler v. Field, 63 F. (2d) 13 (C. C. A. 1st, 1933), cert. denied, 289 U. S. 758 (1933); Molter v. Commissioner, 69 F. (2d) 7 (C. C. A. 7th, 1934); Hopkins v. Commissioner, 69 F. (2d) 11 (C. C. A. 7th, 1934), cert. denied, 293 U. S. 560 (1934); Rodman E. Griscom, 22 B. T. A. 979 (1931); Harry C. Kayser, 27 B. T. A. 816 (1933); Grace L. Wright, 29 B. T. A. 1033 (1934).

[15] This distinction between contingent and vested remainders has uniformly been applied in cases decided after the enactment of the Revenue Act of 1934. Warner v. Commissioner, 72 F. (2d) 225 (C. C. A. 2d, 1934), cert. denied, 293 U. S. 620 (1934), aff'g, 28 B. T. A. 1178; Beers v. Commissioner, 78 F. (2d) 447 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 620 (1935); Forbes v. Commissioner, 82 F. (2d) 204 (C. C. A. 1st, 1936); Twining v. Commissioner, 83 F. (2d) 954 (C. C. A. 2d, 1936), cert. denied, 299 U. S. 578 (1936).

This Court has said that under such circumstances Congress must be presumed to have used the language in question in its settled and accepted sense. *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 115 (1939); *Hecht v. Malley*, 265 U. S. 144, 153 (1924); *Latimer v. United States*, 223 U. S. 501, 504 (1912).[16] If this is correct, the enactment of Section 113(a)(5) of the Revenue Act of 1934 may be said to indicate that the prior administrative and judicial construction of the term "acquire" was in accordance with the legislative intent with reference to it. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *Morgan v. Commissioner*, 309 U. S. 78 (1940).

If the above suggested application of the "reenactment rule" is controlling here, the decision must be for the respondent. As we shall indicate below, the remainder interest of the respondent Knox was contingent under the law of New York until it vested on his thirtieth birthday (*infra*, pp. 49-51). Therefore, applying the test of technical contingency heretofore accepted by the Circuit Courts of Appeals, the respondent did not acquire, and cannot be said to have held, until his thirtieth birthday, the securities which he sold within two years from that date.

Recently a conflict has developed between the Fourth and the Second Circuit Courts of Appeals with reference to

[16] On this point see also discussion of Mr. Roswell Magill, the representative of the Treasury Department at the hearings on the 1934 Act and later Under Secretary of the Treasury, in his book Taxable Income (1936), pp. 388, 389: "The courts, however, have clung tenaciously to the vested-contingent distinction. * * In its recent regulations, however, the Treasury has abandoned the distinction and declared that hereafter the basis shall be the value as of the date of the creation of the remainder in all cases. In view of the court decisions in the cases cited, the effectiveness of this administrative action is questionable. If there is merit in the argument that Congress, by reenacting prior statutes which have been uniformly interpreted by the Treasury, has given such interpretations the force of law, then it should take Congressional action to change the interpretation."

the construction of the word "acquire" in Section 113(a)(5) of the Revenue Act of 1934, in so far as it is applicable to contingent remainders.[17] In *Reynolds v. Commissioner*, 114 F. (2d) 804 (1940), pending in this Court on writ of certiorari, No. 684, the Fourth Circuit Court of Appeals held that the above outlined legislative history of Section 113(a)(5) of the 1934 Act required a continued application of the test of contingency in determining the time of acquisition. In *Van Vranken v. Helvering*, 115 F. (2d) 709 (1940) the Second Circuit Court of Appeals traced this same legislative history, and stated that it would have followed the *Reynolds* case but for what it considered the prohibitive implications of the decision of this Court in the *Hallock* case. In so far as it may be considered analogous to the present case, we have already indicated that we accept the premise of the *Van Vranken* case as it disregards the technical distinctions between vested and contingent remainders. The error into which the Court there fell was in proceeding from its premise to the illogical conclusion of treating all remainders as giving absolute ownership, whereas the decision in the *Hallock* case abandoned the distinction between vested and contingent remainders, but clearly recognized the difference between absolute and conditional interests, as, in fact, it was required to do in order to uphold the tax imposed in the *Hallock* case.

We, therefore, do not urge upon the Court one of the alternative positions rather than the other. While it is our opinion that the distinction made in the *Hallock* case, as we believe it should be applied, between absolute and

[17] The Sixth Circuit Court of Appeals has recently joined with the Second Circuit Court of Appeals on this question. Augustus v. Helvering, decided February 14, 1941. The decision turns upon a treatment of the legislative history of the section which is contrary to the conclusions on that matter of both the Second and Fourth Circuit Courts of Appeals.

conditional ownership, is sounder than the test depending upon the vested or contingent nature of the remainder, the decision on this issue must in either event be in favor of the respondent.

D. If considered material, the respondent Knox's remainder was, under the law of New York, contingent until he attained the age of thirty years on September 1, 1928.

The New York law is settled and clear as to the vesting of remainders such as that here in question, and under it the remainder of Mr. Knox was contingent until he arrived at the ages specified in his father's will. The Board of Tax Appeals in its decision below so found (Knox No. 474, R. 50; Campbell, No. 473, R. 115).

The primary criterion of vesting in New York is the intention of the testator. *Lewisohn v. Henry*, 179 N. Y. 352, 361 (1904); *Cammann v. Bailey*, 210 N. Y. 19, 30 (1913); *Lane v. Corwin*, 63 F. (2d) 767, 769 (C. C. A. 2d, 1933), cert. denied, 290 U. S. 644 (1933). In the Knox will the testator expressed his intention to make a future rather than a present gift in exact words, *i. e.*, following the gift of income until the beneficiary arrived at a certain age, he provided, "at which time, I give, devise and bequeath" a portion of the trust fund (Knox, No. 474, R. 32). The entire testamentary scheme of the Knox will of successively postponing the gifts until the beneficiary should reach a maturity sufficient to care for an estate of such size likewise evidences this intention in the clearest manner. The New York Court of Appeals has long held that remainders created under provisions indistinguishable from those in the Knox will do not vest until the required age is reached. *Lewisohn v. Henry*, 179 N. Y. 352 (1904); *Fargo v. Squiers*, 154 N. Y. 250 (1897), approving on this point, 6 App. Div. 485, 39 N. Y. Supp. 648 (1st Dept. 1896); see *Matter of*

Trevor, 239 N. Y. 6, 14 (1924); *Dimmick v. Patterson*, 142 N. Y. 322, 326 (1894).

This intention of the testator is reinforced by the existence in the Knox will of a gift over on the death of the beneficiary before reaching the required age (Knox, No. 474, R. 32). It is established in New York that the presence of such a gift over, after a gift postponed until arrival at a certain age, is a controlling indication that the remainder is contingent. *Fargo v. Squiers, supra; Smith v. Edwards*, 88 N. Y. 92, 107 (1882); *Greenland v. Waddell*, 116 N. Y. 234, 244 (1889); *Clark v. Cammann*, 160 N. Y. 315, 326 (1899). The absence of such a gift over requires that the gift be held to be vested. *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 581 (1916); *Matter of Inslee*, 233 App. Div. 144, 146, 251 N. Y. Supp. 251, 253 (4th Dept. 1931).

In *Lewisohn v. Henry, supra*, the pivotal ground for decision was the intention of the testator to make a future gift as evidenced by facts substantially identical with those under the Knox will. The respondents rely upon *Lewisohn v. Henry* as a holding to that effect. The "divide and pay over rule" is obviously not applicable to the Knox will and the respondents do not cite *Lewisohn v. Henry* for this purpose or rely upon the "divide and pay over rule." That *Lewisohn v. Henry* is still law is shown by the reliance upon this case in *Matter of Trevor*, 239 N. Y. 6, 14 (1924), one of the most recent decisions of the Court of Appeals on vesting.

The Commissioner states that the respondents, in maintaining that the remainders are contingent, do not rely upon the existence of a gift over in the event of the failure of the life beneficiary to survive, and that they do rely upon the "divide and pay over rule." He then proceeds to argue at length on this assumption. (Commissioner's *Gambrill* Brief, Nos. 472-475, pp. 34, 38-45.) The respondents have never

made the arguments imputed to them either in the Board or the Court below and do not now make such argument.

The law of New York on vesting is notoriously complex. As applied to the instant facts, however, it has been settled by the Court of Appeals in the cases cited above. The Commissioner's argument to the contrary consists simply of throwing in unrelated complexities to seek decision in his favor in the resulting confusion. Thus the doctrine of *Moore v. Littel*, 41 N. Y. 66 (1869), injected into the argument by the Commissioner at pp. 36, 37, 39 and 40 of his *Gambrill* Brief, Nos. 472-475, is a classic New York oddity which, if it has continued life in New York, is applicable only in its particular fact situation. See Walsh, *Future Estates in New York* (1931) §8; Chaplin, *Suspension of the Power of Alienation* (3d ed. 1928) §§569-582; I Simes, *Future Interests* (1936) §§83-85. Likewise, the "divide and pay over rule" cases cited in profusion by the Commissioner are entirely beside the mark. If any of these cases are intended as direct authority, they are patently to be differentiated on the peculiarities of the will or other facts in question or on the absence of a gift over. For example, the decision in *Cammann v. Bailey*, 210 N. Y. 19 (1913) (cited at p. 44 of the Commissioner's *Gambrill* Brief, Nos. 472-475), as shown by the concurring opinion (210 N. Y. at p. 32), turned entirely upon a minute peculiarity of the will there involved.

Matter of Vanderbilt, 172 N. Y. 69, 72 (1902), in the respect relied upon by the Commissioner, is purely dictum contained in an opinion in which only three out of seven Judges of a sharply divided Court concurred. In so far as it is inconsistent with the later cases of *Lewisohn v. Henry*, *supra*, and *Matter of Trevor*, *supra*, this dictum must be taken to have been disapproved by the Court of Appeals.

THIRD POINT

In applying the "first in, first out" rule the Woolworth stock purchased by the respondent Campbell prior to distribution to her by the testamentary trustees of other Woolworth shares must be deemed to be "first in" and must be regarded as sold first.

Prior to July 10, 1928, the respondent Campbell purchased 1,000 shares of Woolworth stock out of her personal funds (Campbell, No. 473, R. 18). On July 10, 1928, her twenty-eighth birthday, there were distributed to her by the testamentary trustees pursuant to the will, 15,000 additional shares of Woolworth stock, which shares were owned by the trustees prior to the date of her individual purchases (Campbell, No. 473, R. 18). In 1929, on a recapitalization of the Woolworth Company, Mrs. Campbell received 40,000 shares of new stock in exchange for the 16,000 shares which she then held (Campbell, No. 473, R. 18). In 1933 she sold 10,000 shares of the new stock, which shares could not be identified as being derived either from her personal purchases of the old stock or from the 15,000 old shares received from the trustees on July 10, 1928 (Campbell, No. 473, R. 18).

The question is, what basis should be assigned to the 10,000 shares sold in 1933 for the purpose of determining the gain or loss thereon?

The parties are in agreement that the "first in, first out" rule should be applied. (The "first in, first out" rule will not be found in the statute. It appears in Article 58 of Treasury Regulations 77 promulgated under the Revenue Act of 1932.) Article 58, in so far as it is material, is as follows:

> "When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots can not be determined, the

stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. * * *"

It is respondent Campbell's contention that the rule should be so applied as to exhaust first her individual purchases made prior to the distribution to her of any shares from the trust. This was the holding of the Board of Tax Appeals (Campbell, No. 473, R. 115):

> "The rule should receive a practical and reasonable application. It means purchased by the particular taxpayer. A person should not be deemed to have purchased property prior to the time that he purchased it or acquired the title to it, unless there is some express statutory provision to that effect."

The Court below affirmed the Board of Tax Appeals and in its opinion (Campbell, No. 473, R. 139) said:

> "* * * During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own."

There are no decisions or rulings to the contrary. Hence, this Court is not called upon to resolve any conflict as to this issue.

While the rule as stated in Article 58 of Regulations 77 refers to lots of stock "purchased" at different dates or at different prices, the application of the rule may not be limited to securities which have been purchased as distinguished from those which have been otherwise obtained. The rule incorporates by reference the rules of tacking set out in subparagraphs (A), (B), (C) and (D) of Section 101(c)(8).

The Commissioner's theory is that the "first in, first out" rule requires a sequence consistent with the order of "acquisition" in the sense in which that word is used

in *Brewster v. Gage,* 280 U. S. 327 (1930). This is clearly unsound. Nothing in Article 58 of the Regulations requires the application of the order of constructive acquisition as distinquished from actual acquisition. Nor does the rule embrace any of the technical concepts involved in definition of the word "held" as used in Section 101(c)(8) of the statute. Paragraph 8 of that section is not made part of the rule. Only the rules of tacking found in subparagraphs (A), (B), (C) and (D) of that section are imported into Article 58. The parenthetical clause which reads "(relating to the period for which property has been held)" is obviously for the sole purpose of more particularly identifying and describing the reference to Section 101(c)(8).

Of these rules of tacking only paragraph (B) has any relevancy. Article 58 of the Regulations, when read in conjunction with that paragraph, requires that when shares are obtained by a taxpayer from any other person under circumstances in which the taxpayer is obliged to use the basis of the other person under Section 113, such shares must be deemed to have been "purchased" on the date as of which that basis is fixed.

The obvious purpose of the adoption of these rules of tacking was to bring the "first in, first out" rule into harmony with the "basis" provisions of Section 113. *Cf. Richardson v. Smith,* D. C. Conn., September 13, 1938, not officially reported but set out in 1938 C. C. H. Federal Tax Service, Vol. 4, paragraph 9503, reversed on other grounds, 102 F. (2d) 697 (C. C. A. 2d, 1939).

If, as we have contended under the First Point above, the respondent Campbell's cost basis in the securities distributed to her by the testamentary trustees is fixed as of the date of that distribution, there is no occasion for applying paragraph (B) of the rules of tacking, and she must be deemed to have "purchased" the stock received from the

trustees on the date of such distribution. This being so, the stock purchased individually by Mrs. Campbell prior to the distribution to her of like shares from the trustees must be deemed to be the "first in" stock within the meaning of the rule and must be regarded as the first stock sold by her.

This construction of the "first in, first out" rule is practical and is in accord with the realities. The rule is a formula designed to facilitate the determination of gain or loss on the sale of securities where identification is impossible, by associating the sale price of particular shares with the purchase price of particular shares. Since the rule is intended to determine the order in which unidentifiable securities are sold, it should be construed as requiring that such securities are sold in the order in which they become available to the taxpayer for sale.

The intimation at pages 28 and 29 of the Commissioner's *Gambrill* Brief, Nos. 472-475, that his determination on this issue is the application of some established administrative rule in such situations is wholly gratuitous. He refers to no published ruling and we are confident that there is none. We do not question the validity of Article 58 of the Treasury Regulations. We deny, however, that every application of that Article by the Commissioner, however arbitrary, must be given weight as evidence of a long standing administrative practice. The "first in, first out" rule is not a creation of the Commissioner and did not have its genesis in the Treasury Regulations. It is an ancient rule having wide usage in other fields of the law. *Cf.* 3 *Scott on Trusts* (1939) §517. Its purpose is to provide a presumption of fact in the absence of proof of fact. Its application should bear some relation to fact and it may not be arbitrarily applied.

As already observed in other connections in this brief, Mrs. Campbell had no specific trust property which she had

obtained as her own as distinguished from her remainder interest. The trustees had a power of sale under the will (Campbell, No. 473, R. 98) which authorized them to dispose of any of the trust property in their hands. Indeed the decedent expressed the wish that at least fifty per cent of the trust estate should be sold and invested in legal investments within five years after his death (Campbell, No. 473, R. 98). The exercise of these powers was in no way dependent upon Mrs. Campbell's consent. In any realistic application of the "first in, first out" rule it is anomalous to say that the stock received by Mrs. Campbell from the trustees on July 10, 1928, was "first in" (taking priority over the shares purchased by her in 1926 and 1927), in the face of the fact that until July 10, 1928, she not only did not own the stock held in trust but might never receive it. In any view of the matter the "first in, first out" rule should be so applied as to hold that the securities purchased individually by Mrs. Campbell in 1926 and 1927 must be deemed to be sold prior to the securities distributed to her by the trustees in 1928.

Conclusion

The decisions of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Statutes

Revenue Act of 1928:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

* * * * *

(b) Tax in case of capital net loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) Definitions.—For the purposes of this title—

* * * * *

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

* * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the

provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Revenue Act of 1928:

Sec. 113. Basis for Determining Gain or Loss.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair

Revenue Act of 1932:

Sec. 113. Adjusted Basis for Determining Gain or Loss.

(a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that—

* * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the

market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

Revenue Act of 1928:

Sec. 701. Definitions.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation,

• • •

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

Revenue Act of 1932:

Sec. 1111. Definitions.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

• • •

(14) The term "taxpayer" means any person subject to a tax imposed by this Act.

Regulations

Treasury Regulations 77 under the Revenue Act of 1932:

Art. 58. Sale of stock and rights.—When shares of stock in a corporation are sold from lots purchased

at different dates or at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101(c) (8) (relating to the period for which property has been held) shall be applied. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain. * * *

Committee Reports

Revenue Act of 1928

The Report of the Joint Committee on Internal Revenue Taxation, H. R. Doc. No. 139, 70th Cong., 1st Sess. (1927), in so far as material, states (p. 17):

Basis for Gain or Loss on Sales by an Executor

Until recently gain or loss on an executor's sale was measured by the value at the decedent's death of what was sold. As a result of the decision by the Court of Claims in McKinney v. United States, and the denial of certiorari by the United States Supreme Court, the rule was changed so as to provide that gain or loss on such a sale would be measured as though the decedent had sold the property during his life.

The rule of the McKinney case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover, as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income. The old rule seems preferable, and it is recommended that it be set forth in the statute.

Section 204(a)(5) prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

The material portion of the Report of the House Committee on Ways and Means, H. R. Rep. No. 2, 70th Cong., 1st

Sess. (1928) 18, is set forth in full at pp. 10-11 of this brief.

The Report of the Senate Committee on Finance, Sen. Rep. No. 960, 70th Cong., 1st Sess. (1928), in so far as material, states (p. 26):

Sec. 113.—Basis for Determining Gain or Loss—Executors' Sale

The decision by the Court of Claims in McKinney v. United States has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113(a)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113(a)(5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the bene-

ficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

Section 113(a)(4) is amended so as to provide that the basis in the case of property passing under power of appointment, regardless of the time of acquisition, shall be the fair market value on the date of acquisition, which is the rule of the present law and of the House bill.

Section 113(a)(3) is amended by striking out the last sentence of the House bill, with the effect of including within the paragraph all classes of transfers in trust made after December 31, 1920 (even if made in contemplation of death or to take effect in possession or enjoyment at or after death). The basis thus provided is the basis the property would have in the hands of the grantor, adjusted for gain or loss recognized to the grantor when the transfer was made.

The effect of striking out the last sentence of section 113(a)(3) is also to make the basis in the case of gifts in contemplation of death or to take effect in possession or enjoyment at or after death, if made after December 31, 1920, the same as the basis which the property would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

The Report of the Committee of Conference on the Revenue Act of 1928, H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928), in so far as material, states (pp. 14, 15):

Section 113(a)(5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical pur-

poses vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary; and the House recedes, with the following amendment:

A special rule is provided in section 113(a)(5) by which to determine the basis of property transferred in trust with the right reserved to the grantor at all times prior to his death to revoke the trust where the sale or other disposition of property occurs after the death of the grantor. This rule includes sales or other dispositions by the trustee and also by a beneficiary of the trust. In view of the complete right of revocation in such cases on the part of the grantor at all times between the date of creation of the trust and his death, it is proper to view the property for all practical purposes as belonging to the grantor rather than the beneficiaries and to treat the property as vesting in the beneficiaries according to the terms of the trust instrument, not at the date of creation of the trust, but rather on the date of the grantor's death, for the purpose of determining gain or loss on sale or other disposition of the property after the grantor's death by the trustee or by a beneficiary. Accordingly, it is provided that the basis of such property in the hands of the persons entitled thereto by the terms of the trust instrument after the grantor's death shall be the same as if the trust instrument had been a will executed on the date of his death. Thus property acquired by virtue of revocable trusts of the kind described is treated, for all practical purposes, the same as though it had been transmitted by the grantor by will at his death.

APPENDIX B

Chronological History of the Revenue Acts Relating to the Basis of Property Acquired by Inheritance and Gift

The first statutory provision for determining the basis for gain or loss on the sale of property appeared in the Revenue Act of 1918 as Section 202(a), and provided simply that the basis for property acquired after March 1, 1913, was "the cost thereof." Treasury Regulations 45, Article 1562, promulgated under this Act, provided that as to property acquired by bequest, devise or descent, the basis was the value at the time of acquisition.

In 1920 the Bureau of Internal Revenue ruled that under the Revenue Act of 1918, where personal property was acquired by a remainderman having only a contingent interest prior to the death of the life tenant, the basis for gain or loss on the sale of such property by the remainderman was its value at the date of the death of the life tenant. O. D. 727, 3 Cum. Bull. 53 (1920). At the same time in related rulings the Bureau ruled that where the interests of remaindermen vested in right at the date of death of the decedent, the basis of property sold by them was the value at the time of the vesting of their interests or the March 1, 1913 value if the interests vested prior thereto. Sol. Op. 35, 3 Cum. Bull. 50 (1920) (overruling Law Opinion 649); O. D. 694, 3 Cum. Bull. 53 (1920). It also ruled that property acquired by residuary bequest should have as a basis its value as of the date of death of the decedent. O. D. 667, 3 Cum. Bull. 52 (1920).

The Revenue Act of 1921, effective November 23, 1921, contained the first express provision for the basis of property acquired by inheritance. In Section 202(a)(3) it provided that the basis of "property acquired by bequest, devise, or inheritance" should be the value of the property

"at the time of such acquisition." The Committee reports state that the existing law with respect to such property was in substance preserved. H. R. Rep. No. 350, 67th Cong., 1st Sess. (1921) 9, 1939-1 Cum. Bull. (Part 2) 168, 175; Sen. Rep. No. 275, 67th Cong., 1st Sess. (1921) 10, 1939-1 Cum. Bull. (Part 2) 181, 188.

In 1922 and 1923 the Bureau of Internal Revenue again ruled that the basis on the sale of property by the remainderman of a testamentary trust was the time when the remainder vested in right. I. T. 1622, II-1 Cum. Bull. 135 (1923); I. T. 1165, I-1 Cum. Bull. 30 (1922).

Under the Revenue Act of 1924 the provision as to the basis for property acquired by inheritance found in the 1921 Act was reenacted in substantially identical form. Revenue Act of 1924, Section 204(a) (5).

The first decision under these basis provisions came in the case of *F. W. Matthiessen, Jr.*, 2 B. T. A. 921 (1925). *Cf. F. W. Matthiessen, Jr., v. United States*, 65 Ct. Cl. 484 (1928). In this case the Board had before it the question of the basis under the 1918 Act of securities sold by a residuary legatee. It held that the time of acquisition of the securities, and hence the basis, was the time of the delivery of the securities to the legatee and not the date of the death of the decedent.

The Revenue Act of 1926, Section 204(a) (5), reenacted in identical form Section 204(a) (5) of the 1924 Act, and thereby continued in force value at the date of acquisition as the basis of property acquired by inheritance.

Later in 1926 the Court of Claims in the case of *McKinney v. United States*, 62 Ct. Cl. 180, held that under the 1918 Act the basis for securities sold by an executor was the basis of the securities to the decedent and not the value of the securities at the date of death. The General Counsel of the Bureau of Internal Revenue thereafter issued a rul-

ing holding in accordance with the *McKinney* case on the same facts but under the 1921 Act. G. C. M. 2705, VI-2 Cum. Bull. 174 (1927).

During 1925, 1926 and 1927 the Bureau of Internal Revenue issued a number of rulings under the 1924 and 1926 Acts, which stated or indicated that in accordance with prior rulings the basis for the sale of property by the remainderman of a trust was the value at the time the interest vested. S. M. 3781, IV-2 Cum. Bull. 21 (1925); S. M. 4640, V-1 Cum. Bull. 60 (1926); I. T. 2379, VI-2 Cum. Bull. 116 (1927).

In 1927 the Board of Tax Appeals in *Alice Fisher Foster,* 7 B. T. A. 1137, and the District Court for the Western District of New York in *Brewster v. Gage,* 25 F. (2d) 915, followed the *Matthiessen* case, *supra,* and held that the basis for securities sold by a residuary legatee was the value at the time of delivery to him and not the value at the date of the death of the decedent. The 1918 and 1921 Acts were involved in these cases.

This, then, was the situation at the time the Revenue Act of 1928 came under consideration. The values on several dates were held to be the bases for gain or loss, the use of each depending upon the fact situation involved. The Treasury had consistently held that the basis for property sold by the remainderman of a testamentary trust turned upon whether the remainder was vested or contingent and was the value of the property at the time the remainder vested. As to property sold by an executor the Bureau had first ruled that the basis was the value at the date of death but after the holding in the *McKinney* case had ruled in accordance with that case that the basis was the same as the decedent's basis. As to property sold by a residuary legatee, the Bureau had consistently ruled that the basis was the value at the date of death. The few decisions of

the Board and Courts on this point, however, were to the contrary.

The immediate legislative history of the enactment of Section 113(a) (5) of the Revenue Act of 1928 has been set forth in detail in this brief, *supra,* pp. 9-13.

The Revenue Act of 1932 reenacted Section 113(a) (5) of the Revenue Act of 1928 in identical form. The Committee reports on the 1932 Act make no mention of this Section.

Brewster v. Gage, 280 U. S. 327, decided in 1930, is the first decision by this Court on the basis of property acquired by inheritance. In this case the Court affirmed the Circuit Court of Appeals for the Second Circuit which had reversed the District Court decision previously mentioned (*supra,* p. x). It held that under the 1918 and 1921 Acts fixing the basis at the date of acquisition, the basis for securities sold by a residuary legatee was the value at the date of the decedent's death. The taxpayer there argued that the 1928 Act expressed the meaning of the earlier Acts. The Court rejected this argument and said (p. 337):

> "The Revenue Act of 1928, §113(a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819 (26 USCA §2113). The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. United States v. Magnolia Co., 276 U. S. 160, 162, 48 S. Ct. 236, 72 L. Ed. 509, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes."

After the decision of this Court in *Brewster v. Gage* a considerable body of cases arising under various Revenue Acts from that of 1918 to that of 1926, and as to realty under the 1928 and 1932 Acts was decided by Circuit Courts of Appeals.[18] In all of these cases the Courts held that the test of the basis of property sold by the remainderman of a testamentary trust was whether the remainder interest was contingent or vested and that the basis was the value of the property at the time the remainder vested in interest.

The administrative rulings on Section 113(a) (5) of the Revenue Acts of 1928 and 1932 have been inconsistent.[19] The decisions of the Courts and the Board of Tax Appeals on Section 113 (a) (5) of the 1928 and 1932 Acts are set forth in this brief, *supra*, pp. 7, 8.

In the Revenue Act of 1934 Section 113 (a) (5) was again changed and Congress returned to the basis fixed in the 1926 and preceding Acts, *i. e.*, the time of acquisition of the property. The Revenue Acts following the 1934 Act and the Internal Revenue Code have retained the form of the 1934 Act.

The Committee reports on the 1934 Act state at length the reason for the return in that Act to the date of acquisition basis. The House Ways and Means Committee report states that the 1928 and 1932 Acts had permitted evasion of taxes where an executor and testamentary trustee were the same person and that doubt as to the meaning of the term "date of acquisition" had been eliminated, citing *Brewster v. Gage*, 280 U. S. 327 (1930), *supra*. H.

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[18] These cases are listed at pages 7, 46 of this brief in footnotes (1) (14) and (15).

[19] G. C. M. 6195, VIII-1 Cum. Bull. 99 (1929); G. C. M. 6811, IX-1 Cum. Bull. 136 (1930); I. T. 2539, IX-1 Cum. Bull. 139 (1930); G. C. M. 10260, XI-1 Cum. Bull. 79 (1932); G. C. M. 11309, XII-1 Cum. Bull. 126 (1933); G. C. M. 14893, XIV-1 Cum. Bull. 202 (1935).

R. Rep. No. 704, 73d Cong., 2d Sess. (1934) 27, 28, 1939-1 Cum. Bull. (Part 2) 554, 574. The Senate Finance report in the main simply repeats the language of the House Committee report. Sen. Rep. No. 558, 73d Cong., 2d Sess. (1934) 34, 1939-1 Cum. Bull. (Part 2) 586, 612.

After the enactment of the Revenue Act of 1934 the Treasury issued Regulations 86 under the 1934 Act which provided in Article 113(a) (5)-1 that the basis in all cases should be the value at the date of death. This Article has been retained in substantially identical form as Article 113 (a) (5)-1 of Regulations 94, under the 1936 Act, and of Regulations 101, under the 1938 Act, and as Section 19.113 (a) (5)-1 of Regulations 103, under the Internal Revenue Code. The decisions of the Courts on the validity of this regulation are listed and discussed at pp. 30, 31, 47, 48 of this brief.

Beginning with Treasury Regulations 45 promulgated under the Revenue Act of 1918 and continuing through to the present Treasury Regulations 103 under the Internal Revenue Code, the Regulations under the section of the statute dealing with the basis of property acquired by inheritance have contained the following sentence in practically identical form:

> "* * * For the purpose of determining the profit or loss from the sale of property acquired by bequest, devise, or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax, or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes, should be deemed to be its fair market value when acquired. * * *"

(Treasury Regulations 45, Article 1562)

Treasury Regulations 33 (revised edition), paragraph 44, contained approximately the same provision in less complete form.

In the Regulations under the Revenue Acts prior to th
1928 Act this sentence was primarily an appraisal pro
vision, defining the method for determining fair marke
value in fact situations where it is otherwise found to b
applicable. The sentence was retained solely as a method
of-evaluation provision under the 1928 and subsequen
Revenue Acts and the Internal Revenue Code. It appear
in Article 596 of Regulations 74 and 77 under the 1928 and
1932 Acts and as a separate subsection, Article 113 (a)
(5)-1 (c) of Regulations 86, 94 and 101 and Section 19.113
(a) (5)-1 (c) of Regulations 103, under the Revenue Acts
of 1934, 1936 and 1938 and the Internal Revenue Code.

Prior to the Revenue Act of 1921 the Revenue Acts had
made no special provision for the basis of property ac
quired by gift. The general rule of the cost of the property
contained in Section 202(a) (2) of the 1918 Act was that
applicable. Article 1562 of Treasury Regulations 45, under
the 1918 Act, however, provided that the basis of property
acquired by gift was the value at the date of acquisition.
See also Treasury Regulations 33 (revised), Article 4, par
41, under the 1916 Act.

In the 1921 Act Congress provided that if property was
acquired by gift after December 31, 1920, the basis was the
same as in the hands of the donor or the last preceding
owner by whom the property was not acquired by gift. If
the property was acquired by gift prior to December 31,
1920, the basis was the value at the time of such acquisition.
Revenue Act of 1921, Section 202(a) (2). The Committee
reports state that this special provision was enacted to
prevent tax evasion. H. R. Rep. No. 350, 67th Cong., 1st
Sess. (1921) 9, 1939-1 Cum. Bull. (Part 2) 168, 175.

In the Revenue Act of 1924 similar provisions were en-
acted as Section 204(a) (3) and part of Section 204(a) (4),
dealing with property acquired through an *inter vivos*

trust. These provisions were necessary since ***inter vivos*** trusts had not been included within the general provision for gifts. H. R. Rep. No. 179, 68th Cong., 1st Sess. (1924) 16, 1939-1 Cum. Bull. (Part 2) 241, 253; ***Edward T. Bedford Trust,*** 42 B. T. A. 748 (1940).

These provisions were continued in substantially identical form as Section 204(a) (2), (3) and (4) of the Revenue Act of 1926 and as Section 113(a) (2), (3), and (4) of the 1928 and 1932 Acts. In the 1934 Act Section 113(a) (2) was amended to provide that as to property acquired by gift after December 31, 1920, the basis should be the basis in the hands of the donor or the last preceding owner by whom the property was not acquired by gift, except that for the purpose of determining loss the basis should be the basis so determined or value of the property at the time of gift, whichever is lower. As a result of this last limitation, if the donee has a loss with reference to the donor's cost, but the sale price is greater than the value of the property at the time of the gift, neither gain nor loss is recognized. (Example: Donor's cost, $150; Value at time of gift, $100; Donee's sale price, $125; Result, no gain or loss.) Subsequent Revenue Acts and the Internal Revenue Code retained the gift sections in the form of the 1934 Act.